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Hiew Min Yong v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42–43 OF 1993
AUGUSTINE PAUL J
20 NOVEMBER 2000

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Criminal Procedure *— Trial — Prosecution's case — No finding that prosecution had proved case beyond reasonable doubt — Burden on accused only evidential burden — Whether accused must raise reasonable doubt on balance of probabilities — Long delay in trial —þWhether retrial should be ordered*

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The accused was charged and found guilty by the learned sessions court judge under s 420, and s 471 read with s 465 of the Penal Code. He was convicted and sentenced to term of imprisonment, which he appealed. One of the main grounds was that the learned sessions court judge had misdirected herself on the question of burden of proof on the prosecution at the close of its case as stated in her grounds of judgment.

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Held, ordering the accused be acquitted and discharged:

(1) No finding was even made that the prosecution had proved its case beyond reasonable doubt. If such a finding had in fact been made, it may be possible to infer that the learned sessions court judge had evaluated the testimony of the witnesses for the prosecution. The court was therefore compelled to conclude that she arrived at her verdict on evidence the veracity and credibility of which still remain suspended (see p 5D).

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(2) The burden on an accused is only to raise a reasonable doubt and not, as stated by the learned sessions court judge, a reasonable doubt on a balance of probabilities. This has the effect of elevating the evidential burden on the accused to a legal burden. The heavier burden placed by the learned sessions court judge on the accused is a serious misdirection in law and militates against the elementary principles of criminal jurisprudence (see p 5G–H).

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(3) The delay in the trial itself and the time taken to supply the grounds of judgment has resulted in the learned sessions court judge failing to assess the credibility of witnesses at the end of the case. This, coupled with the fact that she had misdirected herself on the question of burden of proof vitiates the conviction of the accused. The court was of the view that it was not appropriate to order a retrial in view of the long delay in the prosecution of this case (see p 7B).

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[**Bahasa Malaysia summary**

Tertuduh telah dituduh dan didapati bersalah oleh hakim mahkamah sesyen di bawah s 420, dan s 471 ditafsirkan bersama s 465 Kanun

Keseksaan. Tertuduh disabit kesalahan dan dihukum penjara, dan telah membuat rayuan. Salah satu alasan utama adalah bahawa hakim mahkamah sesyen tersalah arah dalam soal beban pembuktian ke atas pendakwaan pada penghujung kes seperti yang dinyatakan dalam alasan penghakimannya.

Diputuskan, mengarahkan tertuduh dibebaskan dan dilepaskan:

(1) Tidak ada keputusan langsung bahawa pendakwaan telah membuktikan kesnya melampaui keraguan yang munasabah. Jika keputusan ini telahpun dibuat, kesimpulan mungkin boleh dibuat bahawa hakim mahkamah sesyen telah menilai keterangan saksi-saksi pendakwaan. Oleh itu, mahkamah harus membuat kesimpulan bahawa hakim mahkamah sesyen telah mencapai keputusannya yang kebenaran dan kebolehpercayaannya masih belum terbukti (lihat ms 5D).

(2) Beban pada tertuduh hanyalah untuk mengemukakan keraguan yang munasabah dan bukan, seperti yang dikatakan oleh hakim mahkamah sesyen, keraguan yang munasabah pada imbangan kebarangkalian. Ini mempunyai akibat meningkatkan beban keterangan yang ada pada tertuduh kepada beban undang-undang. Beban yang lebih berat yang diletakkan oleh hakim mahkamah sesyen ke atas tertuduh merupakan salah arah yang serius dalam undang-undang dan bercanggah dengan prinsip-prinsip asas jurisprudens jenayah (lihat ms 5G–H).

(3) Penangguhan dalam perbicaraan tersebut dan masa yang diambil bagi membekalkan alasan penghakiman telah menyebabkan hakim mahkamah sesyen gagal menilai kebolehpercayaan saksi-saksi pada penghujung kes. Ini, berserta kesimpulan bahawa hakim mahkamah sesyen telah tersalah arah dalam soal beban pembuktian telah menjejaskan sabitan tertuduh. Mahkamah berpendapat bahawa adalah tidak wajar mengarahkan perbicaraan semula memandangkan penangguhan lama dalam pendakwaan kes ini (lihat ms 7B).]

Notes

For cases on prosecution's case generally, see 5 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3509–3513.

Cases referred to

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Bahruni bin Ismail v PP [1997] 2 MLJ 265 (refd)
Briginshaw v Briginshaw (1938) 60 CLR 336 (refd)
Harun bin Abdullah v PP [1998] 3 MLJ 1 (refd)
Haw Tua Tau & Anor v PP [1981] 2 MLJ 49 (refd)
Ling Ah Hun v PP (Perak Criminal Appeal No 26 of 1950 [1960] MLJ xiv (refd)

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Nagappan a/l Kuppusamy v PP [1988] 2 MLJ 53 (refd)
Ragunathan v PP [1982] 1 MLJ 139 (refd)
Surendran a/l Rajaratnam v PP [1998] 2 MLJ 49 (refd)
Tan Hun Wah v PP [1994] 1 MLJ 382 (refd)
TN Nathan v PP [1978] 1 MLJ 134 (refd)
Voon Chin Fatt v PP [1948–49] MLJ Supp 131 (refd)
Yusoff bin Kassim v PP [1992] 2 MLJ 183 (refd)

Appeal from: Kes Tangkap No s 74 (26–31)–88 & 62–24–89 (Sessions Court, Kuala Lumpur)

Prasad Abraham (*Veronica Mary Anne Dominic* with him) (*Prasad Abraham & Associates*) for the appellant.

Ahmad Rosli bin Mohd Sham (Attorney General's Chambers) for the respondent.

Augustine Paul J. : The accused was charged in the sessions court at Kuala Lumpur with four charges under s 420 and 18 charges under s 471 read with s 465 of the Penal Code ('the Code'). He claimed trial to all the charges. Briefly stated, the facts of the case are that the accused was the managing director of Hiew Fook Realty ('HFR'). HFR entered into an agreement ('the agreement') with a group of leasing companies to facilitate a syndicated leasing facility. Some of the leasing companies are KSM Credit and Leasing Sdn Bhd and D & C Finance Bhd. Under the agreement, HFR was supposed to purchase new vehicles and lease them to the leasing companies. The case for the prosecution was that moneys were released by the leasing companies on the instructions of HFR and on the representation of HFR that the vehicles had been purchased and delivered to HFR when in actual fact they were not. It was the defence's case that the agreement was just a means to lend money to HFR and that the participating financiers in the syndicate were aware that no vehicles were involved and, as such, the charges cannot be sustained. At the end of the trial the accused was found guilty and convicted on all the charges. He was sentenced to four years' imprisonment in respect of each of the charges under s 420 and six months' imprisonment in respect of each of the charges under s 471 read with s 465 of the Code. All the sentences were ordered to run concurrently. This appeal is by the accused against the convictions and sentences that had been imposed.

At the hearing of the appeal before me, several grounds of appeal were advanced. One of the main grounds was that the learned sessions court judge had misdirected herself on the question of burden of proof on the prosecution at the close of its case as stated by her at p 17 of the grounds of judgment:

> In coming to a decision that the prosecution had established a prima facie case against the accused which if unrebutted would warrant his conviction … .

And at p 33:

> Accordingly, I hold that the prosecution has established a prima facie case against the accused which if unrebutted would warrant his conviction.

The defence contended that since the burden of proof on the prosecution at the end of its case is to make out a case beyond reasonable doubt, as laid down in cases such as *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 and *Bahruni bin Ismail v PP* [1997] 2 MLJ 265 the test applied by the learned sessions court judge was wrong in law. It was correctly contended that this amounted to a misdirection in law and is fatal (see *Harun bin Abdullah v PP* [1998] 3 MLJ 1, *Surendran a/l Rajaratnam v PP* [1998] 2 MLJ 49). Be that as it may, it becomes unnecessary to consider this line of reasoning in view of the manner she had applied the test adopted by her and her treatment of the burden of proof on the accused. It is true that even though she had used the words ' … which if unrebutted would warrant his conviction … ' as required by the law as it then stood, she had in fact used the prima facie test as enunciated by the Privy Council in *Haw Tua Tau & Anor v PP* [1981] 2 MLJ 49 and followed in cases such as *Ragunathan v PP* [1982] 1 MLJ 139 and *Munusamy v PP* [1987] 1 MLJ 492 which only required a minimal evaluation of the evidence at the close of the case for the prosecution. This is borne out by what she said at p 32 of her grounds of judgment, with regard to the evidence of PW1:

> Merely because he had not been forthright on one or two occasions does not necessarily make him a witness devoid of any credibility. As submitted by the DPP, at this stage of the trial, the court is not called upon 'to descend into questions of the accuracy, veracity and credibility of the witness or his testimony as of finality. These issues must be left suspended until after the conclusion of the case'.

The credibility of PW1, a material prosecution witness, was therefore left suspended at the close of the prosecution case. Since it had been left suspended it must be reviewed and evaluated at the conclusion of the case. This is necessary in order to determine whether the relevant facts that are required to provide proof of the ingredients of the offence have in fact been proved. As Dixon J said in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at p 361:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found.

This requires a positive finding on the credibility of witnesses and, consequently, the acceptance of their evidence. It is only then that a finding can be made on whether the prosecution has discharged its burden of proving the case beyond reasonable doubt. As Hashim Yeop Sani SCJ (as he then was) said in *Nagappan a/l Kuppusamy v PP* [1988] 2 MLJ 53 at p 54:

> In a criminal proceeding, the onus on the prosecution throughout is to prove beyond reasonable doubt. From the beginning to the end, the burden remains on the prosecution to prove the guilt of the accused. At the close of the whole case, the court has to consider all the evidence adduced by both the

A prosecution and the defence and has to be satisfied that the case has been proved beyond reasonable doubt.

> In other words, at the close of the whole case, the court has to consider all the evidence before it whether they satisfy all the ingredients of the offence. If upon the whole evidence the court is left in a real state of doubt, the prosecution is said to have failed to satisfy the onus of proof which lies upon it.

B However, the learned sessions court judge did not return to the evidence of PW1 nor that of any other prosecution witness at the close of the case for the defence. At that stage, she merely evaluated the evidence of the accused and proceeded to find him guilty. As she said at p 39 of her grounds of judgment:

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> I do not believe him and to my mind, his story has not cast a doubt on the prosecution case for both charges under ss 420, 471 and 465 read together, of the Penal Code.
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> Accordingly, the accused was found guilty and convicted.

D It must be observed that no finding was even made that the prosecution had proved its case beyond reasonable doubt. If such a finding had in fact been made it may be possible to infer that the learned sessions court judge had evaluated the testimony of the witnesses for the prosecution. I am therefore compelled to conclude that she arrived at her verdict on evidence the veracity and credibility of which still remains suspended. The verdict of the E learned sessions court judge is therefore wrong in law even on the test adopted by her. This is compounded by the fact that she had placed a legal burden on the accused. This can be seen from what she had said at p 36 of her grounds of judgment:

> F Thus, at this stage of the trial where the burden on the accused is to cast a reasonable doubt on the prosecution case on a balance of probabilities, I do not think it necessary to reconsider the IDs, merely because they were now formally tendered as exhibits, in order to redetermine whether a prima facie case had in fact been established by the prosecution. Suffice to say that they would be considered in light of the burden of proof of the accused at this stage of the trial.

G It is settled law that the burden on an accused is only to raise a reasonable doubt and not, as stated by the learned sessions court judge, a reasonable doubt on a balance of probabilities. This has the effect of elevating the evidential burden on the accused to a legal burden. In *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169, the (then) Supreme Court observed that proof on a balance of probabilities '… is heavier than the burden of casting H a reasonable doubt …' though it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt. The heavier burden placed by the learned sessions court judge on the accused is a serious misdirection in law and militates against the elementary principles of criminal jurisprudence.

I It is my view that the grave errors committed by the learned sessions court judge resulted from the excessive time she took to conclude the trial and the further inordinate time lapsed in writing the judgment. The trial in

the sessions court has had a chequered history. The accused was first charged in court on 3 February 1988. The trial commenced on 22 August 1988 and was finally concluded on 30 April 1993. The grounds of judgment were delivered on 9 February 1998. The effect of delays in supplying the grounds of judgment was considered in cases such as *Voon Chin Fatt v PP* [1948-49] MLJ Supp 131, *TN Nathan v PP* [1978] 1 MLJ 134 and *Yusoff bin Kassim v PP* [1992] 2 MLJ 183. Mohamed Azmi SCJ in writing for the (then) Supreme Court in *Tan Hun Wah v PP* [1994] 1 MLJ 382 referred to these authorities and said at pp 391–392:

> Where prejudice or unfairness had been sufficiently established, we agreed with and adopted the principle enunciated in the authorities cited before us on the effect of excessive delay not only in the supply of grounds of judgment but also delay in the trial itself. If the facts of the case so warrant, where there is a long delay in the supply of grounds of judgment, an appellate court would readily accept the allegation of prejudice on the basis that there is every likelihood not only that the trial judge's impression on demeanour of witnesses would be blurred, but also the delay would increase the chances of omission on the part of the trial judge to deal with material facts and issues in the grounds of judgment, which ought to have been favourable to the appellants. Such danger would of course be increased manifold, when, as in the present case, the trial itself was conducted by instalments over a longer period. In this connection, it is relevant to refer to the case of *Ling Ah Hun v PP* (Perak Criminal Appeal No 26 of 1950, referred to in [1960] MLJ xiv), where Rigby J said:
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> > 'But before I leave this case I desire to draw attention to what I consider the quite intolerable delay in the proceedings before the learned president. The offence was committed on 6 January 1959, and both appellants were arrested that same day. Thereafter, there were a number of adjournments, primarily because, as it would appear from the record, the prosecution itself at that time was undecided as to whether the case should go for a preliminary enquiry or as to whether it should be dealt with summarily by the learned president. Finally, it was decided that the case should be summarily dealt with, and the trial commenced on 10 June 1959 — five months after the offence had been committed. It was then part heard, and did not continue until 16 July — again, some six weeks later. On 16 July the trial concluded and the learned president recorded a conviction. Quite properly, thereafter he adjourned the case in order to obtain a probation officer's report. Proceedings were again heard on 5 August, and sentence was passed on that day. Notice of appeal was at once given that same day, 5 August, and the appellants were released on bail pending the determination of the proceedings. On the notice of appeal being filed it was incumbent upon the learned president to provide his grounds of decision, and for the petition of appeal to be lodged within 10 days after the grounds of decision had been so provided. Those grounds of decision were not supplied until 26 February 1960. It apparently took the learned president six months and 21 days in which to prepare the grounds of decision in this relatively short and simple case. Delays of this nature are wholly intolerable and make an utter farce of the proper and expeditious administration of justice.'
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> As far as prejudice and unfairness are concerned, there ought to be no distinction in principle between delays in the High Court and the subordinate

courts. We would with respect adopt the opinion of Rigby J and hold that in the present appeal, the delay of three years in supplying the grounds of judgment from the date of filing of the notices of appeal was wholly intolerable and made an utter farce of the proper and expeditious administration of justice.

The delay in the trial itself and the time taken to supply the grounds of judgment has resulted in the learned sessions court judge failing to assess the credibility of witnesses at the end of the case. This, coupled with the fact that she had misdirected herself on the question of burden of proof vitiates the conviction of the accused. I was of the view that it was not appropriate to order a retrial in view of the long delay in the prosecution of this case. Accordingly, I quashed the convictions and sentences imposed on the accused and ordered that he be acquitted and discharged.

Reported by Wong Ee Lynn